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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

THE ALASKA LEGISLATIVE COUNCIL, on behalf of THE ALASKA STATE LEGISLATURE, Plaintiff, v. HONORABLE MICHAEL J. DUNLEAVY, in his official capacity as Governor for the State of Alaska, KELLY TSHIBAKA, in Her official capacity as Commissioner of Administration for the State of Alaska, and MICHAEL JOHNSON, in his official capacity as Commissioner of the Alaska Department of Education and Early Development, Defendants.	)	Case No. 1JU-19-00753 CI
COALITION FOR EDUCATION EQUITY, Intervenor.	)	

MEMORANDUM IN SUPPORT OF COALITION FOR EDUCATION EQUITY, INC.'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

The primary question in this case is whether the Legislature can appropriate public education funding for consecutive fiscal years so school districts do not have to "pink slip" teachers while they wait for the political branches to pass the state's full operating budget. The clear answer to this question is yes. The education clause of the Alaska

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Constitution gives the Legislature both the obligation and the authority to fund Alaska's public education system. And the Supreme Court has repeatedly held that the Legislature has significant flexibility in carrying out its obligations under the education clause. So long as the Legislature acts within the "limits of rationality," its efforts to tackle complex issues related to maintaining a system of public education in the state are entitled to respect from the executive and judicial branches. Because advance appropriations like those in Ch. 6, SLA 2018 fall squarely within the Legislature's authority to maintain a system of public education in the state, and do not violate any express or implied provision of the Alaska Constitution, they are valid and constitutional.

The Governor complains that advance appropriations or forward funding for public education encroach on various executive prerogatives. This claim is without merit for a variety of reasons. But even if the Governor's outsized view of executive power is correct, not every encroachment on executive prerogative renders a statute invalid. Instead, in such cases the court is required to weigh the competing constitutional interests at stake. Here, this balancing test tilts heavily in favor of finding the appropriations for public education in Ch. 6, SLA 2018 to be a valid exercise of legislative power in service of the constitutional values espoused in the education clause.

Public education serves broad societal interests. It prepares children to participate in the most fundamental aspects of civic life by being able to vote, serve on juries, serve in the military, and participate in the civic affairs of the community. Public education also prepares students to enter the workforce, to pursue careers, to further their education

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at the university level, and to pursue vocations, professions, and trades that sustain Alaska's economy. As Chief Justice Earl Warren wrote in *Brown v. Board of Ed.*:

> Today [education] is a principal instrument in awakening a child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[1]

The delegates to the Alaska constitutional convention were also keenly aware of the importance of public education. They made it the *only* public service that the State is required by the Constitution to provide to its citizens. Article VII, § 1 of the Alaska Constitution provides that the "legislature shall by general law establish and maintain a system of public schools open to all children of the state." This clause imposes an ongoing duty on the Legislature to establish and maintain public schools and it guarantees all school-aged children of Alaska the right to a public education.[2]

The advance appropriations or forward funding at issue in this litigation are exactly the type of flexible solution to a complex financing problem that our constitutional delegates envisioned and the Alaska Supreme Court has endorsed. As addressed more fully below, advance appropriations remedy a problem that is unique to public education funding and has resulted in unnecessary lay-offs of the dedicated

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[1] *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

[2] *Hootch v. Alaska State-Operated School System*, 536 P.2d 793, 799 (Alaska 1975), *Macauley v. Hildebrand*, 491 P.2d 120 (Alaska 1971), *Breese v. Smith*, 501 P.2d 159, 167 (Alaska 1972), *Alaska State-Operated School System v. Mueller*, 536 P.2d 99 (Alaska 1975), *Tunley v. Municipality of Anchorage School Dist*., 631 P.2d 67 (Alaska 1980), *Matanuska-Susitna Borough School Dist. v. State*, 931 P.2d 391 (Alaska 1997), *Municipality of Anchorage v. Repasky*, 34 P.3d 302 (Alaska 2001), and *Kasayulie v. State*, Case No. 3AN-97-3782 CI (Alaska Sup.. Ct. 1999).

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teachers who form the backbone of our public school system. It is a problem well within the Legislature's constitutional authority to address.

The Governor contends that our public schools must take a backseat to his own aggrandized view of executive authority. By the *ipse dixit* of his Attorney General, he has declared the appropriations unconstitutional and refused to disburse funding, leaving our schools and communities in limbo. But the Governor's self-serving objections are baseless, and his refusal to faithfully execute the laws of this state are a violation of both the Alaska Constitution and his oath of office. The appropriations made in Ch. 6, SLA 2018 are a valid exercise of the Legislature's authority under the education and appropriations clauses, and the Court must order the Governor to comply with the law.

II. THE EDUCATION CLAUSE, ARTICLE VII, SECTION 1[3]

Public education occupies a unique position in Alaska's constitutional framework. It is the *only* public service that the constitution requires the State to provide to its citizens, and the *only* public service that Alaskan citizens have a constitutional right to receive. Accordingly, Article VII, § 1 of the Alaska Constitution (the education clause) is of paramount importance in evaluating the competing constitutional interests at stake in this lawsuit. The Governor's suggestion that the education clause is irrelevant to this funding dispute is troubling, but unsurprising. The State has similarly attempted to avoid

[3] CEE is mindful of limits the Court has placed on its intervention in this case. In addressing the education clause of the Alaska Constitution, CEE is not attempting to litigate the contours of the State's obligation to adequately fund public schools. Instead, CEE intends to demonstrate that the education clause provides the necessary authority and flexibility for the legislative appropriations that are at issue in this lawsuit.

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any judicial analysis of the education clause in past school funding litigation, to the consternation of several Supreme Court Justices.[4] The education clause is central to this case, and distinguishes the disputed appropriations from other types of funding in the State's operating budget. The Court cannot meaningfully evaluate the claims and defenses in this case without understanding the history and purpose of that clause, and the respective obligations it imposes on the executive and legislative branches of state government.

A. The Education Clause Vests the Legislature with Exclusive Responsibility and Authority Over Public Schools in Alaska

Prior to statehood, Alaska had two education systems.[5] The United States Bureau of Indian Affairs ("BIA") operated one system for Alaska Native students, and the territorial legislature and department of education operated another system for non-

[4] *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 102 (Alaska 2016) (Stowers, J., concurring) ("[L]ike Justice Winfree, I am concerned that the court was not given the opportunity to decide the dedicated funds question controlled by article IX, section 7 of the Alaska Constitution as presented by this appeal in the fuller context of the public schools clause of article VII, section 1 of the Alaska Constitution…. [T]he parties intentionally did not litigate this question either in the superior court or this court, and notwithstanding pointed questions by several justices in oral argument inquiring into the potential application of article VII, section 1, the parties adamantly insisted that constitutional provision was not in issue. In my view, therefore, the question whether the State's required local contribution is constitutional under the public schools clause remains an undecided question."); *Id.* at 102–04 (Winfree, J., concurring) ("In my view the [education funding] question cannot be answered definitively without a full interpretation and understanding of the Alaska Constitution's public schools clause, which, apparently for strategic reasons, the parties did not confront…. By apparent design, the tail may be wagging the dog—the parties appear to be using the dedicated tax clause to define the public schools clause's limits…. This would be a remarkable conclusion to reach without ever considering the public schools clause.").

[5] *Hootch v. Alaska State-Operated School System*, 536 P.2d 793, 800 (Alaska 1975) (emphasis added).

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Natives and those Natives leading a "civilized life."[6] The framers of the Alaska Constitution were determined to end this dual system and establish a single, unified system for all of Alaska's children. It was with this fundamental purpose that the framers proposed Alaska's education clause, which was ultimately adopted as Article VII, § 1 of the Alaska Constitution. It provides in relevant part: "The legislature shall by general law establish and maintain a system of public schools open to all children of the State…."

It was not an historical accident that the framers vested responsibility for public education in the Legislature. Earlier versions of the education clause would have simply vested that responsibility in "the state." For example, a draft proposed by the Committee on Preamble and Bill of Rights provided: "The *state* shall establish and maintain by general law a system of public schools which shall be open to all children of the state. …"[7] The founders ultimately changed "state" to "legislature" to clarify which division of the government would be primarily responsible for public education. As delegate James Hurley explained:

> The first change from the (original version) embodied the second word . . . which . . . said that the 'state' shall do something and we have suggested that the term 'legislature' be used in order to pinpoint it to a particular division of the state government. . . .[8]

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6 *Id.*

7 6 Proceedings of the Alaska Constitutional Convention, Appendix V, 68 (Committee Proposal No. 7, December 15, 1955).

8 5 Proceedings of the Alaska Constitutional Convention 331 (January 27, 1956), quoted in *Hootch v. Alaska State-Operated School System*, 536 P.2d 793, 801 n.26 (Alaska 1975).

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Accordingly, the Legislature's leading role in public education was part of the founder's deliberate constitutional design, as the Alaska Supreme Court has recognized: "[The education clause] not only requires that the legislature 'establish' a school system, but gives to that body the continuing obligation to 'maintain' the system…. [T]he provision is unqualified; no other unit of government shares responsibility or authority."[9]

The Alaska Supreme Court has interpreted the education clause on a number of occasions since statehood. Two critical propositions emerge from these decisions. First, as just explained, the education clause vests the legislature with exclusive responsibility and authority over public schools in Alaska. As a corollary, legislative actions in the sphere of public education are entitled to respect from the executive and legislative branches, so long as they are "within the limits of rationality."[10] Second, the education clause serves dual purposes. "It imposes a duty upon the state legislature, and it confers upon Alaska school age children a right to education."[11] In *Moore v. State*, Judge Gleason further defined the State's constitutional duty under the education clause. Judge Gleason ruled that education funding must be adequate to "accord schools the ability to provide instruction in the standards" to afford children a meaningful educational opportunity.

> First, there must be rational educational standards that set out what it is that children should be expected to learn. These standards should meet or exceed a constitutional floor of an adequate knowledge base for children.

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9 *Macauley v. Hildebrand*, 491 P.2d 120, 122 (Alaska 1971).

10 *Hootch*, 536 P.2d at 803.

11 *Id*. at 799.

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> Second, there must be an adequate method of assessing whether children are actually learning what is set out in the standards. Third, there must be adequate funding so as to accord to schools the ability to provide instruction in the standards. And fourth, where, as here, the State has delegated the responsibility to educate children to local school districts, there must be adequate accountability and oversight by the State over those school districts so as to insure that the districts are fulfilling the State's constitutional responsibility to "establish and maintain a system of public schools" as set forth in Article VII, § 1 of Alaska's Constitution. [12]

B. The Legislature Delegates Responsibility for Education to Local School Districts

To fulfill its constitutional mandate, the Legislature has delegated responsibility for public education through a system of locally controlled school districts. It has defined three types of school districts according to where the district is located: city school districts, borough school districts, and regional education attendance areas.[13] Under AS 14.12.010(2), each organized borough is its own school district, and must establish maintain, and operate, a system of public schools on an areawide basis.[14] Local school boards manage and control these school districts under authority delegated by AS 14.12.020.

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[12] *Moore v. State*, Case No. 3AN-04-0756 CI, 2007 WL 8310251, *76 (Alaska Sup. Ct., June 21, 2007).

[13] AS 14.12.010. City school districts are those located within a home-rule area or city but outside an organized borough. *Id.* Borough school districts are those located in organized boroughs. *Id.* Regional education attendance areas are those located outside organized city, home-rule, or borough boundaries. *Id.*

[14] AS 29.35.160(a).

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Funding for local school districts is a cooperative and interdependent effort between the State and local governments.[15] Local borough and city governments are required to raise a minimum amount of funding from local sources to maintain and operate their local schools.[16] The amount of this "required local contribution" depends on the value of the taxable real and personal property located within the district.[17] State funding then fills the gap between the "required local contribution" and the school district's "basic need," which is also defined by statute.[18] This funding formula, sometimes referred to as the "Foundation Program," was recently upheld against a dedicated funds challenge in *State v. Ketchikan Gateway Borough*, 366 P.3d 86 (Alaska 2016).

In addition to the statutorily required state aid provided under the Foundation Program, the Legislature also appropriates supplemental grant funding to school districts, which is distributed in proportion to each district's "adjusted average daily

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15 For a more detailed explanation of this cooperative funding program, *see State v. Ketchikan Gateway Borough*, 366 P.3d 86, 87-89 (Alaska 2016).

16 AS 14.12.020(c) ("The borough assembly for a borough school district, and the city council for a city school district, shall provide the money that must be raised from local sources to maintain and operate the district."). By contrast, the legislature funds districts located in the regional educational attendance areas, which lack taxing authority. *Id*. ("The legislature shall provide the state money necessary to maintain and operate the regional educational attendance areas."); *see* Alaska Const. art. X, § 2 ("The State may delegate taxing powers to organized boroughs and cities only."); *Matanuska–Susitna Borough Sch. Dist. v. State*, 931 P.2d 391, 399-400 (Alaska 1997) (stating that taxing power explains, in part, why the legislature treats districts differently).

17 AS 14.17.410(b)(2).

18 AS 14.17.410(b)(1). A school district's "basic need" is based on two variables: the district's adjusted average daily membership and the statewide base student allocation. *Id*.

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membership."[19] The Department of Education and Early Development calculates each district's adjusted average daily membership each school year in December or January, making the supplemental grant funding available in late January or February.[20] Thus, a school district's budget for each academic year consists of local contributions, state aid under the Foundation Program, and discretionary state grant funding.

Despite being interdependent, state and local budgeting for public schools does not occur contemporaneously. School districts have to plan for an academic year that begins in mid-August, and therefore complete their initial budgets in early spring. But the State, which operates on a fiscal year that begins July 1st, has historically passed its operating budget (including public school appropriations) much later than that. Consequently, school districts have had to prepare academic year budgets without actually knowing the amount of the State's contribution. Because state aid comprises the majority of school district funding, the uncertainty over state funding levels created significant turmoil at the local level, with school districts having to lay off educators until the State appropriated sufficient school funding to retain or re-hire them.

For example, under the Anchorage Municipal Code, the deadline for the Anchorage School Board to submit its proposed budget to the Anchorage Assembly[21] is

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19 *See* AS 14.17.410(b)(1)(A)–(D).

20 *See* Affidavit of Elwin Blackwell, submitted as Exhibit A to the Governor's Opposition to CEE's Motion to Intervene.

21 Like all boroughs, the borough assembly has the ultimate authority over the school district budget. *See* AS 14.14.060.

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the first Monday in March.[22] Under state law, the assembly then has 30 days to "determine the total amount of money to be made available from local sources for school purposes and shall furnish the school board with a statement of the sum to be made available."[23] Consistent with these deadlines, the Anchorage School District completes an initial budget by early April. But in 2015, the Alaska Legislature did not pass an operating budget until May 31st. And in 2016, the Legislature did not pass an operating budget until June 22nd. In both of these years, the Anchorage School District was essentially forced to budget in the dark, without knowing how much funding the State would ultimately contribute.

A statutory notice requirement for terminating teachers further complicates the problem. Before the State passes its operating budget and appropriates education funding, school districts do not know how many teachers they will be able to retain the following year. If there is a potential for layoffs, school districts are required by law to give affected teachers early notice. For example, tenured teachers in the Anchorage School District must receive a termination notice by May 15, and non-tenured teaches by the last day at school, typically the third week of May. In past years, school districts did not know by mid-May whether they would receive enough state money to retain all of their teachers, and were therefore compelled to "pink slip" them in case funding did not materialize. After the State ultimately passed its operating budget and school districts knew how much funding they would receive, school districts would retract the

[22] Anchorage Municipal Code 6.10.050(C).

[23] AS 14.14.060(c).

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termination notices for those teachers it could afford to retain. This annual firing and rehiring of teachers was time consuming, expensive, stressful, and completely unnecessary. And it had the predictable effect of making it difficult for schools to attract and retain quality educators.

C. Ch. 6, SLA 2018 Remedies the Conflict Between State and Local Budgeting Cycles

Ch. 6, SLA 2018 was specifically intended to address this problem. It did so in two ways. It separated public school funding from the State's regular operating budget so that it could be passed as a standalone bill earlier in the year, prior to the time that school districts would have to issue termination notices to teachers. This aspect of the funding bill brought state budgeting for public education closer in line with local budgeting. But it did not fix the problem altogether. Accordingly, in addition to appropriating funds for the 2018–2019 school year, Ch. 6, SLA 2018 also appropriated funds for the 2019–20 school year. As the bill's sponsor Representative Paul Seaton explained:

> The bill is intended to pass separately from the regular operating budget and early in the session to enable school districts to avoid mandatory teacher layoff notices. Many lawmakers agree that education funding cannot withstand further cuts without negatively affecting Alaskan children. An early, separate appropriation for education that has existing funding identified would prevent these problems and will allow school districts to finalize their budgets on time.
>
> Even after the budget has passed the legislature, line item veto or veto reductions can be made by the Governor. In 2015, the Legislature needed to come back in special session to pass a second operating budget that included education funding. In 2016, the state operating budget was passed by the Legislature on May 31. Last session, the state operating

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> budget did not pass the Legislature until June 22 and signed by the Governor on July 1. All this uncertainty for the funding amount forces school districts to draft multiple budgets. The Anchorage School District is required to submit their budget to the Municipality by the first Monday in March. Anticipating low amounts requires districts to give termination notices (pink slips) to tenured teachers by May 15 and non-tenured teachers by the last day of school.
>
> Education is one of the highest priority programs for the state, and educators are shaping future generations. HB 287 reflects the importance of education to our state.[24]

The Legislature's efforts to address these issues had broad support from educators. Then-Anchorage School District School Board President Tam Agosti-Gisler wrote a letter to Rep. Seaton voicing support for early funding to prevent the yearly "pink slip debacle":

> The Anchorage School Board has as one of its legislative priorities receiving early notice from the Legislature for education funding. Although our preferred date is March 1st since that is when our budget is due to our local Assembly per Municipal code, we do support your bill which will help us avoid the pink slip debacle that our teachers and HR department endured last year. This will have a direct impact on our ability to retain quality teachers. Thank you for your support of education.[25]

Anchorage School District Superintendent Deena Bishop likewise sent a letter of support:

> Early funding will help to avoid unnecessary layoff notices going out to our teachers. As you stated, the statutory deadline for teacher layoff notices to go out is May 15 for tenured teachers and the last day of school for non-tenured—typically the third week in May for ASD.[26]

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[24] Rep. Paul Seaton, Sponsor Statement HB 287 (available at: http://www.akleg.gov/basis/get_documents.asp?session=30&docid=54508).

[25] Letter from T. Agosti-Gisler to Rep. P. Seaton (available at: http://www.akleg.gov/basis/get_documents.asp?session=30&docid=38572).

[26] Letter from Dr. D. Bishop to Rep. P Seaton (Jan. 25, 2018) (available at: http://www.akleg.gov/basis/get_documents.asp?session=30&docid=38845).

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And the Kenai Peninsula Borough approved Resolution 2018-008 entitled "A Resolution Supporting House Bill 287 Providing Early Approval of Funding for Public Education and Student Transportation," which also voiced support for the bill that became Ch. 6, SLA 2018.[27]

D. Governor Dunleavy Withholds Public Education Funding Appropriated by the Legislature

The Legislature passed HB 287 on April 30, 2018, and Governor Walker signed it into law as Ch. 6, SLA 2018 on May 4, 2018. The appropriations bill funded K-12 public school education for the fiscal years ending in 2019 and 2020. With respect to FY2020 funding, Ch. 6, SLA 2018 had three components. Section 5(c) appropriated full Foundation Program funding, which provides state aid to school districts pursuant to the funding formula set forth in AS 14.17.410(b). Section 5(d) appropriated student transportation funding pursuant to the formula found in AS 14.09.010. And Section 4 appropriated $30,000,000 to the Department of Education and Early Development to be distributed as grant funding to school districts in accordance with each district's adjusted average daily membership, as defined by AS 14.17.410(b)(1)(A)–(D).

On May 8, 2019, the Attorney General issued a formal opinion declaring that Ch. 6, SLA 2018 violated the Alaska Constitution and Executive Budget Act by appropriating public education beyond FY2019. Governor Dunleavy announced that he would not release the funds unless the Legislature included them in a new appropriation

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[27] Kenai Peninsula Borough Resolution 2018-008 (Feb. 20, 2018) (available at: http://www.akleg.gov/basis/get_documents.asp?session=30&docid=40904).

subject to his approval or veto. The Legislature declined to do so, electing to file suit instead.[28] As part of the lawsuit, Governor Dunleavy has agreed to distribute Foundation Program and transportation funding in accordance with Sections 5(c) and 5(d) through the end of the 2019-2020 school year, or until this Court rules that the appropriations are unconstitutional, whichever is first. Accordingly, in the event this Court rules in the Governor's favor, there will be an immediate and crippling gap in public education funding. Unless this Court ensures that adequate protections are in place, schools will be forced to close and there will be chaos for students, parents and our communities.

The Governor has not agreed to disburse the $30,000,000 in supplemental grant funding appropriated under Section 4, which he evidently intends to impound regardless of whether Ch. 6, SLA 2018 is held to be constitutional. The Governor's refusal to disburse the supplemental grant funding to school districts under Section 4 is consistent with his conduct during the 2018–2019 school year. On June 17, 2018, Governor Walker signed SB 142 into law as Ch. 19, SLA 2018. Section 21(c) of that act appropriated $20,000,000 for public education that, like the appropriation in Section 4 of Ch. 6, was to be distributed to school districts as grants in proportion to their adjusted average daily membership. But unlike Section 4 of Ch. 6, the $20,000,000 appropriation in Ch. 19 had an effective date of July 1, 2018[29] and was intended for school district use during the

[28] *See* Andrew Kitchenman, *Attorney General Says School Funding Plan is Unconstitutional*, Alaska Public Media (May 9, 2019), https://www.alaskapublic.org/2019/05/09/attorney-general-says-school-funding-plan-is-unconstitutional/.

[29] Ch. 19, SLA 2018, § 37(c).

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2018-2019 school year. There was, accordingly, no "advance appropriation" problem, and no contention by the Governor that the appropriation was invalid.

Although the Governor now admits that this type of grant funding is typically distributed to school districts in the middle of the school year,[30] he nevertheless impounded these funds and refused to make them available for the 2018-2019 school year. His stated rationale for refusing to execute Section 21(c) was that he wanted to defund public education by lobbying the Legislature to repeal the appropriation. Accordingly, $20,000,000 in validly appropriated school funding was held hostage while the Governor embarked on a crusade to slash state spending. CEE filed suit, and Governor Dunleavy eventually released the funds on June 10, 2019, *after* the 2018-2019 school year had ended. The Governor's delay in releasing those funds until the school year ended precluded the use of the funds for educational services and programs. The Governor apparently intends to hold the 2019–2020 school year grant funding at issue in this litigation hostage as well, regardless of whether that appropriation is held unconstitutional.

III. ARGUMENT

The advance appropriations in Ch. 6, SLA 2018 must be upheld as a valid exercise of the Legislature's authority under the appropriation and education clauses of the Alaska Constitution for at least three reasons. First, as with any enacted law, Ch. 6, SLA 2018 is entitled to a presumption of constitutionality. That presumption is at its apex in the

[30] *See* Affidavit of Elwin Blackwell, submitted as Exhibit A to the Governor's Opposition to CEE's Motion to Intervene.

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context of education funding, where legislative judgments are entitled to deference so long as they are "within the limits of rationality." The Governor has neither overcome the presumption of constitutionality, nor demonstrated that the Legislature exceeded the bounds of reason. The appropriations in Ch. 6, SLA 2018 must therefore be upheld.

Second, the advance appropriations in Ch. 6, SLA 2018 do not violate the anti-dedication clause because they do not earmark funds from a specific source of state revenue. To the extent that advance appropriations implicate the anti-dedication clause at all, that clause clashes with, and must yield to, the Legislature's authority under the education and appropriation clauses of the Alaska Constitution.

Third, the advance appropriations in Ch. 6, SLA 2018 do not violate either the letter or the spirit of the veto or appropriations clauses of the Alaska Constitution. The Governor tries to divine from these clauses an implied but absolute constitutional prohibition against any and all advance appropriations. But his argument finds no support in the actual text of these clauses, and conflicts with the Legislature's express and exclusive authority to appropriate funds for the benefit of Alaska's schools.

Finally, this Court should require the Governor and Legislature to submit an agreed upon contingency plan addressing how they intend to ensure immediate and adequate public education funding in the event the Court strikes down Ch. 6, SLA 2018. There is no dispute that the State has a constitutional obligation to maintain its public

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schools by funding the constitutional floor to ensure an adequate level of funding.[31] There is also no dispute that every school aged child in Alaska has a constitutional right to a public education. In the event the Court strikes down Ch. 6, SLA 2018 as unconstitutional, there will be an immediate and complete gap in state education aid. In that event, the State will be in violation of obligations under Article VII, Section 1 and the constitutional rights of Alaska's students will be in jeopardy. The Governor and Legislature should be required to plan for this contingency to mitigate the collateral damage arising from their power struggle.

A. Public School Appropriations Are Entitled to a Heightened Presumption of Constitutionality

Like all statutes, the appropriations at issue in this case are presumptively valid and constitutional.[32] The Governor bears the burden of convincing this court otherwise.[33]

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[31] *See Moore v. State*, Case No. 3AN-04-0756 CI, 2007 WL 8310251, *76 (Alaska Sup. Ct., June 21, 2007) (ruling that the education clause obligates the State to provide "adequate funding so as to accord to schools the ability to provide instruction [to constitutional] standards").

[32] *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 90–91 (Alaska 2016) ("We presume statutes to be constitutional; the party challenging the statute bears the burden of showing otherwise."); *Harris v. Millenium Hotel*, 330 P.3d 330, 332 (Alaska 2014) ("Statutes are presumed to be constitutional, and the person challenging a statute's constitutionality has the burden of showing that the statute is unconstitutional."); *Fraternal Order of Eagles v. City & Borough of Juneau*, 254 P.3d 348, 352 (Alaska 2011) ("We have made clear that '[a] duly enacted law or rule, including a municipal ordinance, is presumed to be constitutional' and that '[c]ourts should construe enactments to avoid a finding of unconstitutionality to the extent possible.'"); *Brandon v. Corrections Corp. of America*, 28 P.3d 269, 275 (Alaska 2001) ("When a constitutional challenge to a statute is raised, the party bringing the challenge must demonstrate the constitutional violation; constitutionality is presumed, and doubts are resolved in favor of constitutionality.").

[33] *Baxley v. State*, 958 P.2d 422, 428 (Alaska 1998) ("A party raising a constitutional challenge to a statute bears the burden of demonstrating the constitutional violation. A presumption of constitutionality applies, and doubts are resolved in favor of constitutionality.").

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Any doubts must be resolved in favor of constitutionality.[34] This is not a vanishing presumption. Even "considerable doubt" about the constitutionality of a legislative enactment is an insufficient basis for declaring it invalid. Justice Winfree's concurring opinion in *Ketchikan Gateway Borough* is instructive. Despite harboring significant doubts about the constitutionality of Alaska's public school funding formula, and detailing those doubts in a thorough concurrence, Justice Winfree nevertheless joined the majority and upheld the statute against a constitutional challenge because he could not conclude that the presumption had been overcome:

> Statutes are presumed to be constitutional, and the party challenging a statute's constitutionality has the burden of persuasion; doubts are resolved in favor of constitutionality. Although I have considerable doubt about the constitutionality of the statutorily required local contribution (RLC) public schools funding component, I cannot conclude that the presumption has been overcome in this case. I therefore agree that the superior court's primary decision—that the RLC is an unconstitutional dedicated tax—should be vacated. But I do not rule out an ultimate conclusion that the RLC is unconstitutional, as a dedicated tax or otherwise, and therefore do not join the court's analysis or decision on this point.[35]

Moreover, the strength of this presumption is at its apex in the context of legislation that appropriates public education funding. This is so for several reasons. First, the responsibility for establishing and maintaining Alaska's public schools rests squarely with the Legislature. As noted above, this was an intentional choice by the constitutional delegates,[36] which the Supreme Court recognized in *Macauley v.*

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34 *Id.*

35 *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 102 (Alaska 2016) (Winfree, J., concurring) (internal footnotes omitted).

36 *See Supra*, p. 6.

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Hildebrand, 491 P.2d 120, 122 (Alaska 1971): "[T]he language [of the education clause] is mandatory, not permissive. [It] not only requires that the legislature 'establish' a school system, but gives to that body the continuing obligation to 'maintain' the system. Finally, the provision is unqualified; no other unit of government shares responsibility or authority." (emphasis added) Appropriation power similarly rests with the Legislature.[37] Because the Legislature is acting within the core of its constitutional authority when it appropriates public school funding, judicial inquiry into the propriety of such funding is correspondingly limited.[38] By contrast, the executive branch's authority over both public education and legislative appropriations is circumscribed and limited. The governor may veto or reduce appropriations before they become law, and nothing more.[39] After funds have been appropriated, the Governor has no constitutional authority to withhold them, and must instead faithfully execute the Legislature's directives.[40] The Governor's authority is therefore at its nadir in the context of public education funding.

Second, the Alaska Supreme Court has repeatedly held that the education clause gives the Legislature considerable flexibility to address the complex and evolving challenges of maintaining a state-wide school system. For example, discussing the education clause in *Ketchikan Gateway Borough*, the Court noted:

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37 Alaska Const. art. IX, § 3.

38 *Cf. Wauchope v. U.S. Dep't of State*, 756 F. Supp. 1277, 1282 (N.D. Cal. 1991) (noting that where Congress legislates in areas where legislative power is at its zenith, "Congressional plenary power in these areas limits the scope of judicial inquiry into the propriety of such legislation") (citing *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)).

39 Alaska Const. art. II, § 15.

40 *Id*. art. III, § 16.

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> [The delegates] designed the constitution to be flexible so that the legislature could fill in the "exact details [later]." Though the delegates sought to limit certain powers and to avoid certain pitfalls, they did not intend to compel the State to unravel existing programs nor did they intend to prevent the State from experimenting and adapting to changing circumstances.[41]

And in *Hootch v. Alaska State-Operated School System*, the Supreme Court explicitly recognized that the legislature's efforts to address problems related to public school financing are entitled to respect, so long as they are within the "limits of rationality."

> The very complexity of the problems of financing and managing a statewide public school system suggests that there will be more than one constitutionally permissible method of solving them, and that, within the limits of rationality, the legislature's efforts to tackle the problems should be entitled to respect.[42]

Under the foregoing authorities, the Court must uphold the advance appropriations in Ch. 6, SLA 2018 as presumptively constitutional unless the Governor can establish that the Legislature acted outside the "limits of rationality." The Governor cannot make that showing. Advance appropriations are an eminently rational way to remedy the unique funding problems they were designed to address. Their use in the federal government's budgetary processes have a long and uncontroversial history.[43] And the

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41 *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 94–95 (Alaska 2016).

42 *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793, 803–04 (Alaska 1975) (internal citations and quotations omitted) (quoting *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 42 (1973).

43 *See* United States General Accounting Office, *Terms Used in the Budgetary Process* (July 1977) (defining "advance appropriation" as "an appropriation provided by the congress for use in a fiscal year, or more, beyond the fiscal year for which the appropriation act is passed") (available at https://www.gao.gov/assets/190/180148.pdf); Congressional Research Service, *Advance Appropriations, Forward Funding, and Advance Funding: Concepts, Practice, and Budget Process Considerations* (June 10, 2019) (available at https://fas.org/sgp/crs/

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specific appropriations at issue here were approved by Alaska's Governor at the time they were passed. They are well within the "limits of rationality" and must therefore be upheld.

B. Advance Appropriations Do Not Violate the Anti-Dedication Clause

The Governor's primary argument is that advance appropriations for public education violate the anti-dedication clause, which provides in relevant part that "[t]he proceeds of any state tax or license shall not be dedicated to any special purpose[.]"[44] But as the State has previously argued, "a dedicated funds problem exists only when both parts of the constitutional prohibition are satisfied: there must be a specific incoming source of revenue and a specific outgoing dedication to a particular purpose."[45] While the Supreme Court has interpreted the phrase "proceeds of any tax or license" to mean all sources of state revenue,[46] a law impermissibly dedicates funds only if it requires *specific* revenues or receipts to be spent on *specific* purposes, *i.e.* when it "effectively eliminates…a source of revenue previously available to future legislatures."[47]

Unlike the statutory schemes that have run afoul of the dedicated funds clause in the past, the advance appropriations at issue in this case have only one part—a

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misc/R43482.pdf); Congressional Research Service, *Department of Education Funding: Key Concepts and FAQ* (Feb. 19, 2019) (available at https://fas.org/sgp/crs/misc/R44477.pdf).

44 Alaska Const. Art. IX, § 7.

45 Brief of Appellants State of Alaska; Michael Hanley, Commissioner of Alaska Department of Education and Early Development, in his official capacity, Appellants/Cross Appellees, v. Ketchikan Gateway Borough; et al, Appellees/Cross-Appellants., 2015 WL 4498941 *34 (Alaska 2015).

46 *State v. Alex*, 646 P.2d 203, 209 (Alaska 1982).

47 *Myers v. Alaska Housing Finance Corp*., 68 P.3d 386, 391 (Alaska 2003).

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requirement that the State make payments from the general fund to meet its future education funding obligations.[48] The advance appropriations in Ch. 6, SLA 2018 do not meet the criteria for a dedication because they are not tied to an actual tax or revenue source, and do not "eliminate…a source of revenue previously available to future legislatures." There is no specific revenue stream being dedicated to public education or any other special purpose. There is instead a future financial obligation that the State must fulfill. But simply having a future financial obligation is not the same as having a dedicated funds problem. The State has a myriad of financial obligations that extend into the future.[49] None of these obligations presents a dedicated funds problem because the legislature has not pre-pledged money from a particular source of revenue to satisfy them.

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[48] *See Alex*, 646 P.2d at 207 (royalty assessment on sale of salmon dedicated to aquaculture associations); *Southeast Alaska Conservation Council v. State*, 202 P.3d 1162, 1170 (Alaska 2009) (grant of state land to University of Alaska with revenues from the land dedicated to the university). Moreover, even those precedents where no violation of the dedicated funds clause was found involved a two-part scheme: Alaska Marine Highway revenues were held not to be dedicated to fund the system, because "[t]he act clearly states that the fund is part of the general fund and it may not be spent until and unless it is appropriated by the legislature." *Sonneman v. Hickel*, 836 P.2d 936, 939 (Alaska 1992). Similarly, the sale of the future proceeds of the tobacco settlement to the Alaska Housing Finance Corporation and the dedication of the sale proceeds to rural school improvements was held not to violate the anti-dedication clause because the tobacco settlement was not a traditional source of revenue and the future proceeds could constitutionally be reduced to present value, sold and the money appropriated for rural schools. *Myers*, 68 P.3d at 392.

[49] *See, e.g.*, AS 47.25.455(a) ("The department shall pay at least $280 a month to a person eligible for assistance under this chapter..."); AS 39.20.110 -39.20.130 (state employees entitled to per diem and/or a mileage allowance when traveling for official business); AS 39.20.360 (unpaid state employee compensation owed to named beneficiary of deceased state employee); AS 39.27.011 (classified and partially exempt employees entitled to compensation according to salary schedule).

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The Governor argues that even if there is no technical dedication in this case, advance appropriations frustrate the purposes of the anti-dedication clause by limiting options for future spending. But the Supreme Court has held that the Legislature has the power to act within its constitutional authority even if its actions "may conflict with the purposes of the anti-dedication clause."[50] In *Myers v. Alaska Housing Finance Corp*., the Supreme Court held that a court must "choose between competing constitutional values" in cases where "the anti-dedication clause clashes with the legislature's appropriation power."[51] The competing constitutional values in *Myers* were "the prohibition on dedicated funds and the legislative power to manage and appropriate the state's assets." Weighing these values, the Court held that incidental conflict with the purposes of the anti-dedication clause did not render the Legislature's action invalid in light of the Legislature's core responsibility to manage state assets. The balance of values is tilted even more heavily in favor of the Legislature in this case. The Legislature passed Ch. 6, SLA 2018 not only pursuant to its authority to manage and appropriate state assets, but also pursuant the unique mandates and obligations of the education clause. These are weightier interests than those at stake in *Myers*. And any conflict with the anti-dedication clause is more attenuated. In *Myers*, the Supreme Court was confronted with legislation that "effectively eliminate[d]…a source of revenue previously available to future legislatures."[52] There is no such conflict in this case. No single revenue source is

50 *Myers*, 68 P.3d at 391.

51 *Id*. 391, 394.

52 *Id*. at 391.

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dedicated to or encumbered by the advance appropriations in Ch. 6, SLA 2018, just as no revenue source is dedicated to any other financial obligation the State has in future years. Accordingly, even if there is some arguable conflict between advance appropriations for public education and the purposes of the anti-dedication clause, the balance of constitutional interests weighs decidedly in the Legislature's favor.

C. The Veto and Appropriations Clauses of the Alaska Constitution Do Not Categorically Prohibit Advance Appropriations

The Governor asks this Court to announce a new constitutional rule that prohibits all advance appropriations from the general fund in all circumstances. The Governor grounds his proposed rule in a conglomeration of the veto and appropriations clauses. The problem with this argument is that advance appropriations do no violence to either of these clauses.

The veto clause provides in relevant part that "[t]he governor may veto bills passed by the legislature. He may, by veto, strike or reduce items in appropriation bills."[53] The Governor contends that this clause requires that he have an opportunity to veto any appropriations made for expenditures during his tenure in office. This interpretation is wrong for a number of reasons. First, the veto clause says nothing of the kind. It requires only that the governor in office at the time an appropriation is passed have an opportunity to reduce or veto the expenditure. There is no question that happened here. Governor Walker signed Ch. 6, SLA 2018 into law on May 4, 2018. It therefore did not impermissibly bypass executive veto.

[53] Alaska Const. art. II, § 15.

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Second, Governor Dunleavy's veto clause argument requires the court to ascribe conflicting meanings to veto powers set forth in the first and second sentences of Article IX, when there is not textual basis for doing so. The Governor's authority to strike or reduce items in appropriation bills parallels his authority to "veto bills passed by the legislature." But for any individual governor, that authority is necessarily limited to bills passed by the legislature while he is in office. Obviously, the Governor has no constitutional authority to exercise veto power over legislation passed into law by his predecessors.

Finally, the Governor's argument ignores the fact that every governor is required to faithfully execute appropriation bills signed into law by their predecessors. Alaskan Governors are sworn in in the middle of the fiscal year, and are required to operate a government funded by appropriation bills they had no opportunity to veto. So even as a practical matter, the argument that a governor has veto authority over all expenditures while he is in office is simply incorrect.

The appropriation clause does not help the Governor's case, either. It provides that: "No money shall be withdrawn from the treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law."[54] On its face, the only limitation contained in the appropriations clause is that expenditures and obligations must be authorized in bills passed by the legislature. It does not restrict the kinds of laws that the legislature uses to

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[54] Alaska Const. art. IX, § 13.

make appropriations, or temporal scope of appropriations bills. Accordingly, the advance appropriations in Ch. 6, SLA 2018 are valid under a plain reading of the appropriations clause. The designated funds can be withdrawn from the treasury in accordance with the law that appropriated them, i.e. for use in the 2019–2010 school year.

Notably, the appropriations clause of the United States Constitution is nearly identical to that of the Alaska Constitution. It provides that "no money shall be drawn from the Treasury but in consequence of Appropriations made by Law[.]"[55] Yet, Congress routinely includes advance appropriations in federal spending bills,[56] and no court has ever suggested that such appropriations are unconstitutional. Similarly, no court has ever suggested that the advance appropriations violate the presentment clause of the United States Constitution, which, like the Alaska Constitution, gives the president the authority to veto spending bills.[57] The Governor's attempt to divine a categorical prohibition against advance appropriations from analogous provisions of the Alaska Constitution should be rejected.

D. The Court Should Require the Governor and Legislature to Commit to a Contingency Plan in the Event the Court Strikes Down Ch. 6, SLA 2018

The Governor and Legislature have asked the Court to issue a decision in this matter on November 8, 2019. Under their current stipulation, state education funding will immediately cease on that date in the event the Court strikes down Ch. 6, SLA 2018

55 U.S. Const. art. I, § 9, cl. 7.

56 *See supra*, n.43.

57 U.S. Const. art. I, § 7, cl. 2 – 3.

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as unconstitutional. If the parties have a plan for this contingency, they have not shared it with the public or with any of CEE's members. The Court should not allow the parties to engage in a reckless game of chicken that threatens to derail the entire public school system in the middle of the fall semester three weeks before Thanksgiving. The chaos and uncertainty that would result from this brinksmanship would not merely be a matter of inconvenience for students and families. The State is constitutionally obligated to fund public schools in the state, and Alaskan students have a corresponding constitutional right to receive that education. The failure to provide a safety net under these circumstances would be a dereliction of the State's constitutional duties countenanced by each branch of the government. Prior to any final decision, the Court should therefore require the Governor and Legislature to provide assurances that Alaska's children, families, and schools will not be forced to shoulder the constitutionally impermissible burden of this political impasse.

IV. CONCLUSION

For all of the foregoing reasons, the appropriations in Ch. 6, SLA 2018 are valid and constitutional as a matter of law. The Governor is therefore bound by the Alaska Constitution and his oath of office to faithfully execute them without delay.

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DATED at Anchorage, Alaska this 13th day of September, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of September, 2019, a true and correct copy of the foregoing was served by email and mail, postage prepaid, upon the following:

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